In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 813

ESTATE OF WALLACE P. GEIGER, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

During the taxable years here involved (1954–1959) taxpayer[1] embezzled funds of the Sheldon National Bank in Sheldon, Iowa. In accordance with the decision of this Court in *James* v. *United States,* 366 U.S. 213, overruling *Commissioner* v. *Wilcox,* 327 U.S. 404 (see also *Rutkin* v. *United States,* 343 U.S. 130), the Tax Court and the court of appeals held that these

[1] "Taxpayer" refers to Mrs. Bernice I. Geiger. The Estate of Wallace P. Geiger, the taxpayer's deceased husband, is a party because joint income tax returns were filed for the years in question.

While tax years 1954–1959 are the only ones involved in this litigation, Mrs. Geiger had been embezzling funds from the bank since 1931. The total shortage occasioned by her activities over this period exceeded two million dollars (Pet. App. 32).

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embezzled funds were includible in her gross income for purposes of computing her income-tax liability.

The sole question raised by the petition (Pet. 2) turns on the fact that the taxable years here fell between the decision in *Wilcox,* holding embezzled funds not to be includible in gross income, and the decision in *James,* overruling *Wilcox* and holding such funds to be within gross income. Petitioners urge that *James* overruled *Wilcox* only "prospectively" and that funds embezzled before the *James* decision are therefore not includible in gross income.

The *James* decision, however, was correctly understood by the court of appeals as holding embezzlement proceeds to be within gross income for purposes of civil tax liability, even though the funds may have been appropriated before the *James* decision. It is true that in *James* the Court determined that the defendant could not be guilty of a wilful criminal evasion of tax on embezzled funds when the alleged acts of evasion occurred before the *James* decision, since the existence of the prior *Wilcox* decision—that embezzled funds need not be reported as income—was held to negate the requisite element of criminal intent. Wilfulness, however, is not an element in civil tax liability. The holding of *James* that embezzled funds are income within the meaning of the Internal Revenue Code was therefore clearly applicable to determine petitioners' tax liability in this case. Indeed, the problem of criminal responsibility for evasion in *James* would not have occurred had the decision not been specifically premised on the understanding

that the reversal of *Wilcox* was to have retrospective effect with regard to the inclusion of funds in gross income. Otherwise, the defendant in *James* would have omitted no taxable income from his return, and discussion of his intent would have been entirely superfluous.[2]

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[2] All of the lower courts which have had occasion to consider the matter have uniformly thus construed the effect of *James*. In addition to the decision below, see *Adame's Estate* v. *Commissioner*, 320 F. 2d 811, 814 (C.A. 5th) (as to the year 1953 which was not barred by the statute of limitations); *Stoller* v. *United States*, 320 F. 2d 340, 344 (Ct. Cl.); *Nerem* v. *Commissioner*, 41 T.C. 338, 344; *Muldrow* v. *Commissioner*, 38 T.C. 907, 912; *Hackney* v. *Commissioner*, decided May 12, 1965 (P–H Memo T.C., par. 65,127); *Emerson* v. *Commissioner*, decided June 30, 1965 (P–H Memo T.C., par. 65,185); see *Leaf* v. *Commissioner*, 295 F. 2d 503 (C.A. 6th). Dicta to the same effect are present in *Sowell* v. *Commissioner*, 302 F. 2d 177, 181 (C.A. 5th); *Donohue* v. *Commissioner*, 323 F. 2d 651, 652 (C.A. 7th), certiorari denied, 376 U.S. 911; *United States* v. *Goldberg*, 330 F. 2d 30, 39 (C.A. 3d), certiorari denied, 377 U.S. 953. All of the above cases except *United States* v. *Goldberg* are civil tax cases.

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